National Marine Fisheries Service
Northwest Region

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Endangered Species Act 4(d) Rules

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The National Marine Fisheries Service is completing almost two dozen hearings in the Pacific Northwest and California on its proposed Endangered Species Act rules aimed at rebuilding threatened salmon and steelhead populations. These are the so-called 4(d) rules. They take a very new approach to salmon protection. Not surprisingly with a new approach, especially one that affects salmon and the rivers and streams they depend on across so much of the Northwest and California, the proposals have generated a lot of misunderstanding.

NMFS is trying something new in these proposals. What is new is providing the chance for state or local authorities, or the private sector, to craft their own conservation strategies, bring them in the door, and demonstrate that they will do what it takes for salmon. In return, they get a "by[e]" from the ESA requirements. Provide a local option. Plain and simple. A choice.

The alternative is what we've been doing for the last twenty years: issue a "plain vanilla" rule that says "taking" of listed species is illegal, then leave it to the subsequent permitting processes or enforcement actions to figure out what that may mean and who might be OK.

We think that providing this local option is a heck of a good idea, as long as it has some scientifically grounded sideboards. Allow me to explain.

By law we have to protect listed salmon. The rules propose to do that by prohibiting anyone from "taking" or harming the listed fish or their habitat. Beyond that, we--and the law--have a lot of room to be flexible and to try to be both fish-friendly and people-friendly. We think it's possible to be both.

At their heart, these rules try to give clearer guidance to people on how to avoid harm to salmon, or at least reduce it to an acceptable level. That's the fish-friendly part. But we also want fish protection to rely wherever possible on state and local designs rather than on federal regulation and enforcement. That's

the people-friendly part.

The rules do this by identifying state or local programs (such as forest practices rules) that provide sufficient protection for salmon, so that anything conforming to such a program doesn't require additional protection under the ESA. In other words, follow an acceptable local conservation program as provided for in our rules and you know you're in compliance with the ESA.

This approach will give people a greater voice in how we save salmon. And, frankly, it's a totally new way of putting the Endangered Species Act to work, protecting not just salmon but the interests of people as well.

We've never tried this before. In the past, we simply issued blanket, boiler-plate regulations saying, "Don't harm listed salmon." In those cases, the only way you could be certain that your actions weren't violating the ESA would be to obtain a permit for those actions ahead of time. And--no surprise here--the permit process could be time-consuming and frustrating. It often focused on individual actions rather than general categories of actions, so each activity might require a separate permit application. It may have been fish-friendly, but it sure wasn't very people-friendly.

The new rules we're proposing provide a simpler way to get ESA clearance for broad categories of actions, rather than for dozens of individual actions. That's the general difference between what we're now proposing and what we used to do.

What about specifics? Two examples come to mind. Forest practices in Washington that conform to the state's recent Forests and Fish Report, and road work that follows the Oregon Department of Transportation's routine road maintenance plan would be exempt from ESA's "no harm" requirements because they are adequately protective. For some other activities, including harvest and hatchery management and urban development, these rules propose standards against which the fisheries service will measure local programs, once they are developed.

We invite comments on whether these programs warrant the limitations on ESA authority. For instance, for local authorities interested in reducing ESA liability from urban development, the rules describe 12 standards that ordinances would need to address, including storm-water management, erosion control and stream-side protection.

That stream-side protection standard has been the source of some of the misunderstanding about the rules. They say that the general range for urban development ordinances of adequate stream-side protection is about 200 feet. That does not mean it is illegal if you don't have a 200-foot buffer. Only that if you want a blanket ESA stamp of approval, you must manage stream-side

areas to provide adequate protection for the stream.

Let me repeat: we are *not* requiring a 200-foot stream-side buffer in this proposal. There is no requirement for any size buffer at all; not for agricultural lands, not for urban lands, not for any other lands. No buffer requirement, period.

Finally, a word about our ultimate goals. Salmon recovery is here to stay, by law, by treaty, by popular desire. So doing nothing is not an option. And the alternatives to the path we have proposed in these rules are more heavy-handed regulations or a protracted legal battle with uncertain results.

Our proposed rules reflect a genuine belief that the surest path to success is vesting people in the outcome by letting them tailor their own strategies for protecting steelhead and salmon.

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